UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

HAROLD TISCHLER,

Debtor

Chapter 7
Case No.: 1-15-44128 (CEC)

CHICAGO TITLE
INSURANCE COMPANY,

Plaintiff

Adversary No.: 15-1194 (CEC)

v.

HAROLD TISCHLER

Defendant.

MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Chicago Title Insurance Company ("Chicago Title") respectfully submits this memorandum of law in opposition to the motion of defendant Harold Tischler ("Debtor" or "Tischler") seeking judgment on the pleadings.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are fully set forth in the complaint in this action (Doc. No. 1) ("Compl."). Esther Tischler ("Esther"), the sister of the Debtor, was, at all times relevant to this action the owner of a certain parcel of real property commonly known as 4316 17th Avenue, Brooklyn, New York (the "Property"). Compl. At ¶ 8. On May 12, 2003, Tischler's sister, Jeanette Tischler ("Jeanette") was appointed guardian *ad litem* of Esther in an action in the Supreme Court of the State of New York, Kings County captioned *Esther Tischler v. Fahenstock & Co. and Kenneth Gold* bearing index number 11341/2003. *Id.*at ¶ 9. Despite having no authority to do so because she was not Esther's guardian for any purpose other than the litigation, on or about January 13, 2004, Jeannette, purportedly acting as the guardian of Esther, executed a deed conveying the Property to the Debtor for no consideration. *Id.* at ¶ 10-11.

On or about June 27, 2004, the Debtor executed a deed conveying the Property to 4316 17 Ave. LLC, an entity solely owned by the Debtor, for no consideration. *Id.* at 12-13. On or about August 17, 2006, 4316 17 Ave., LLC conveyed the Property back to the Debtor for no consideration. *Id.* at ¶14-15.

Despite knowing that he was not the true owner of the Property, on or about November 22, 2006, Tischler executed a promissory note (the "Note") and obtained a loan in the amount of $650,000 from Approved Funding Corp. secured by a mortgage on the Property (the "Insured Mortgage"). *Id.* at ¶ 16-17.

In connection with that transaction, Approved Funding Corp. obtained a loan policy of title insurance from Plaintiff insuring, *inter alia*, that the Insured Mortgage was a valid first lien on the Property (the "Policy"). *Id.* at ¶ 20. By assignment dated June 28, 2010, Approved Funding Corp. assigned the Insured Mortgage to HSBC Bank USA, National Association, as Trustee for the Holders of Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-BAR1 Mortgage Pass-Through Certificates (the "Insured"). *Id.* at ¶ 22.

In 2011, Jerry Tischler, another sibling of the Debtor, commenced an action as the temporary guardian of Esther in the Supreme Court of the State of New York captioned *Esther Tischler v. Jeanette Tischler, et al.* under Index No. 6318/2011 (the "Litigation") seeking to void the conveyances of the Property and return title to the name of Esther and to cancel the Insured Mortgage as a lien on the Property. *Id.* at ¶ 23. Approved Funding and the Insured were named as defendants in the litigation and the Insured submitted a claim to Plaintiff under the Policy and Plaintiff undertook the defense of the Insured in the Litigation. *Id.* at ¶ 24-25.

On November 22, 2011, Justice Yvonne Lewis, of the Kings County Supreme Court, cancelled the Insured Mortgage and voided the conveyances of the Property thereby restoring title to Esther and depriving the Insured of its collateral. *Id.* at ¶ 27-28.

In order to adequately resolve the Insured's claim under the Policy, Plaintiff purchased the Note for $650,000. *Id.* at ¶ 29. Plaintiff is now the holder of the Note and is also subrogated to the rights of the Insured and Tischler is in default of his obligations under the Note because he has failed to make timely monthly payments. *Id.* at ¶ 30-31.

Chicago Title filed this adversary proceeding on December 4, 2015 and Debtor answered the complaint in this action on April 21, 2016. Doc. Nos. 1 and 14. Debtor filed this motion for judgment on the pleadings on June 15, 2016 after the parties had agreed to a discovery schedule.

LEGAL STANDARD

Judgment on the pleading pursuant to FRCP 12(c) is only appropriate where material facts are undisputed and a judgment on the merits is possible merely by considering the contents of the pleading. *Menella v. Office of Court Admin.*, 938 F.Supp. 128, 131 (E.D.N.Y. 1996) *aff'd* 164 F.3d 618 (2d Cir. 1998) *cert denied* 119 S.Ct. 836, 525 U.S. 1086, 142 L.Ed.2d 692 (1999).

ARGUMENT

THE MOTION MUST BE DENIED IN ITS ENTIRETY

The only argument proffered by Debtor in support of the motion is that Chicago Title's claim against Debtor is unenforceable by virtue of the expiration of the statute of limitations and therefore it cannot be deemed non-dischargeable. Doc. No. 19-4 at 3. Specifically, Debtor contends that Chicago Title's claims are governed by the statute of limitations for fraud claims encompassed in CPLR § 213(8) which requires fraud claims to be commenced within six years of the cause of action accruing or two years after the fraud is discovered. Doc. No. 19-4 at 3. This argument is fundamentally flawed because Chicago Title's claim is not premised on fraud but rather on its right to repayment on the note. The allegations concerning Debtor's fraud go to the non-dischargeability of the debt not the underpinning of the debt itself.

Debtor has conflated the two part analysis necessary to determine whether the debt he owes to Chicago Title is non-dischargeable. "[E]very dischargeability proceeding involves two separate inquiries. First, does the creditor hold an enforceable obligation under non-bankruptcy law. Second, is the debt non-dischargeable under bankruptcy law, specifically [11 U.S.C.] § 523(a)." *In re Roland*, 294 B.R. 244, 249 (Bankr. S.D.N.Y. 2003) (citations omitted).

Under the first prong of the analysis, the Court must determine if there is a valid debt. *In re McKendry*, 40 F.3d 331, 337 (10^{th} Cir. 1994). Debt is defined in 11 U.S.C. § 101 (12) as "liability on a claim." Claim is defined in 11 U.S.C. § 101(5)(A) as the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." It cannot be credibly disputed that there is a valid debt owed by Debtor to Chicago Title. Chicago Title is the holder of the note given by Debtor to Approved Funding. Doc. No. 1 at ¶ 30-31. Thus, Chicago Title has a right to payment on the Note. Moreover, Chicago Title's right to payment is not time-barred under New York State law as the note has not reached its maturity date and thus the limitations period has not expired for a suit on the note. CPLR 213(4). The fact that Chicago Title is seeking to have the debt deemed non-dischargeable pursuant to 11 U.S.C. § 523(a) does not convert Chicago Title's underlying claim against Debtor for breach of the note into a fraud claim as Debtor contends in the motion. Accordingly, Chicago Title has established the validity and existence of the debt owed to it by Debtor.

Chicago Title has also satisfied the second prong of the inquiry. "[T]he question of the dischargeability of the debt under the Bankruptcy Code is a distinct issue governed solely by the limitations periods established by bankruptcy law...[and] ... [t]he only applicable limitations period is the sixty day period provided by [11 U.S.C.] § 523(c)." *In re McKendry*, 40 F.3d at 337. The initial creditors' meeting was scheduled to be held on October 7, 2015. *See* September 8, 2015 entry in the lead bankruptcy case 15-44128. The adversary complaint was filed on December 4, 2015 – fewer than sixty days from the first scheduled creditor's meeting. Accordingly, Chicago Title's claims to have the debt owed by Tischler deemed non-dischargeable are timely.

Neither of the cases relied upon in support of its motion actually support Debtor's position. In *In re Dunn*, 50 B.R. 664 (Bankr. W.D.N.Y. 1985), a case that involved an objection to discharge not an adversary proceeding, the court denied a creditor's objection to discharge on the basis that the creditor's underlying claim was time barred under state law and therefore did not constitute a debt to which an objection to discharge may be made. *Id.* at 665. Likewise, in *In re Young*, 313 B.R. 555 (Bankr. W.D.N.Y. 2004), the creditor's underlying claim for diversion was deemed time-barred. *Id.* at 560. But the Court also held that another of the creditor's claims premised upon a judgment was not and therefore the adversary proceeding was permitted to go forward to determine whether or not surviving claim was dischargeable. *Id.* at 560 ("Since Kovalsky holds the prepetition, valid and enforceable Kovalsky Judgment against the Debtor ... it has the opportunity in this Adversary Proceeding to demonstrate to the Court that the debt evidenced by the Judgment should be non-dischargeable..."). As demonstrated *supra* Chicago Title's claim on the note is not time-barred and is therefore a valid debt. As such, it is distinguishable from the dismissed claims in *In re Dunn* and *In re Young*, and do not support Debtor's arguments.

Based upon the foregoing, it is clear that Debtor has failed to establish it right to a judgment on the pleadings. Indeed, the instant motion lacks merit and the arguments asserted by Debtor are contrary to well settled law.

CONCLUSION

It is respectfully submitted that this Court should deny the motion in its entirety.

Dated: Roseland, New Jersey
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